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No. 75-122

In the

Supreme Court of the United States

OCTOBER TERM 1975

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY, a New York corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT

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Petitioner's position is stated simply:

1. The Michigan Public Service Commission ("MPSC") does not have the authority to regulate a light bulb distribution program and

2. In any event, the MPSC's action with respect to Respondent's light bulb program, however one wants to characterize it, is not the command of the sovereign within the meaning of *Parker* v. *Brown,* 317 U.S. 341 (1943).

Nothing suggested in Respondent's brief, whether of fact or law, overcomes Plaintiff's assertions.

I. NO LEGISLATION IS OFFERED BY RESPONDENT TO JUSTIFY THE AUTHORITY OF THE MPSC TO REGULATE LIGHT BULB DISTRIBUTION.

Respondent asserts that "Detroit Edison's Lamp Supply Program is Required by State Legislative Command" (Respondent's Brief, page 23).[1] However, Respondent cites no authority for this proposition. Indeed, no such authority exists. In absence of such authority, Respondent manufactures its own when it states:

> "The combined effect of Michigan's public utility statutes as interpreted by the Supreme Court of Michigan is that the MPSC's *approval* of Detroit Edison's rates which include the cost of providing light bulbs, binds Detroit Edison by a state legislative mandate to continue that program until the MPSC may order otherwise." (R.B. 30). (Emphasis supplied)

Respondent's first step in the manufacturing process is the citing of *Michigan Bell Telephone Co.* v. *Michigan Public Service Commission,* 315 Mich. 533, 24 N.W. 2d 200 (1946). (R.B. 29) But, analysis of the case leaves Respondent short of the mark. In this case, Michigan Bell successfully resisted an order of the MPSC requiring a refund to customers. The Court found the rate order, like legislation, could not have a retroactive effect. The holding does not establish that the Commission's orders have the force of sovereign legislation, but only that like legislation, Commission orders are prospective.[2] Moreover, the order considered clearly dealt with rates over which the MPSC does have authority.

[1] References made to Respondent's Brief hereinafter will be designated as "R.B.", followed by appropriate page number.

Respondent then cites MCLA 460.558 (which it fails to set out in its Brief or appendix) for the proposition that it faces possible criminal sanctions for not complying with an MPSC order (R.B. 30) and MCLA 460.552, which states, "no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission *approving* said rate or charge." (R.B. 30, N. 32). (Emphasis supplied) Continuing its manufacturing process Respondent then argues that by eliminating the lamp service Edison would be obtaining a *de facto* rate increase. (R.B. 29). This combination of judicial, legislative and regulatory conditions is apparently proposed by Respondent as a substitute for the legislative command required by *Parker* v. *Brown.* At the risk of being redundant, it must be said again that the authority to make rates (charges) for electricity (MCLA 460.552) and to control the rules and conditions under which electricity is transmitted and distributed (MCLA 460.551) does not give the MPSC authority to regulate Respondent's distribution of light bulbs.[3] The power to

[2] In fact, this case supports Petitioner in his rebuttal to Respondent's suggestion that Petitioner has not exhausted his administrative remedies. (See infra p. 12)

[3] Edison refers to the collection of its tariffs for classes of customers as the "Schedule of Rates Governing the Sales of Electricity" (see Petitioner opening brief, p.3, n.1) and to the tariff for each class of customer as a "service rate". The word "rate" as used by Edison in the titles and headings of its tariffs is not consistent with the use of the word "rate" in MCLA 460.552. The only

make rules or orders does not give the MPSC the power to direct or control beyond its statutory authority. *Helvering* v. *Sabine Transportation Co., Inc.,* 318 U.S. 306, 311-12 (1943); *Rock* v. *Carney,* 216 Mich. 280, 284, 185 N.W. 798, 799 (1921).[4] If any further proof is needed that the MPSC does not have authority in law to regulate light bulbs Respondent provides it by admitting that at best the MPSC's authority to regulate the lamp program through the rate making process is *de facto* power only (R.B. 49).

Respondent, despite this Court's disfavor of antitrust exemptions, implies a new exemption from the antitrust laws for regulated industries beyond the limits of *Parker* v. *Brown. U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 348 (1963). Respondent has not offered any justifiable reason for such an exemption.

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[3] (Continued)
use of the word "rate" which is consistent with its statutory meaning is when Edison uses that word to refer to the charge for electricity (see 215a). Respondent's brief alternatively refers to "rates which include the cost of providing bulbs" (R.B. 30) and the bulb program included in the "service rate" (R.B. 15, N.24). The Court should be careful not to fall into the same trap as Respondent counsel and conclude that because the light bulb program is described on the Service Rate page that it is also included within the rate.

[4] Petitioner takes no issue with the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Freight, Inc.,* 365 U.S. 127 (1961). Respondent certainly is free to petition the legislature or any agency of the State of Michigan to obtain anticompetitive protection or benefits. The thrust of Petitioner's complaint, however, is that in the exercise of its "Noerr-Pennington" right Respondent better be sure the agency petitioned had the requisite authority to provide the benefit sought, that meaningful disclosure is made to the agency and that the agency acts in compliance with applicable substantive and procedural standards. None of those conditions are satisfied here.

II. NO NEW FACTS ARE SUGGESTED BY THE RESPONDENT TENDING TO SHOW CONCERN OR INTEREST ABOUT THE PROGRAM BY THE MPSC.

Respondent still has not come forward with any argument to rebut Petitioner's claim that no aspects of the light bulb distribution program, including among others, very important facets of the program, such as, number, kind of bulbs available, and methods of distribution are regulated.[5]

Obviously recognizing that it had no basis in fact to meet the tests set forth in *Parker* v. *Brown,* Edison developed a novel theory that at one and the same time is facile and transparent. Edison argues that its customers derive "clear benefit" (R.B. 40) from the program. It follows, Edison argues:

1. That the consumer would be hurt by elimination of the program (R.B. 44, 45);

2. That the MPSC should be commended, not faulted, for not wasting its limited resources investigating a program about which there was such universal joy (R.B. 40, 41);

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[5] Indeed, a careful analysis of the lamp program description in the rate schedule shows that most of the obligations imposed on Edison are illusory. Stripped of its verbiage, Edison can comply by giving out only enough bulbs to fill the permanent fixtures of new homes. Edison could, if it wished, require proof of the proportion of electricity used by a customer for light as opposed to use for other purposes, a proof which customers could not provide because Edison's meters cannot provide such information. Moreover, Edison could cease to offer bulbs at service centers and agencies and still be in compliance. So much for Edison's obligation and with it state compulsion.

3. That state regulation and the antitrust laws have the same goal—efficient resource distribution—and that somehow by permitting distribution of cheap bulbs the MPSC promotes the ends sought by antitrust enforcement.

Two things are wrong with Edison's approach here. Its argument is immaterial[6] and the "facts" concerning benefit are for the most part either erroneous, half-truths, unwarranted speculation or a combination of all three. They have no place in this proceeding.

A discussion of Edison's purported facts of "clear benefit" is warranted here if for no other reason than to demonstrate the weakness of Edison's case and the lengths to which it has gone to avoid meeting the issues which the Petitioner has raised. Edison asserts that its customers will lose some $3,000,000 per year if the program ceases (R.B. 45). Edison's clairvoyance is amazing, for how is it to know what effect elimination of the program will have on both the electricity rate and use. If, as Edison contends, bulbs will be more expensive presumably less will be sold and less electricity used. How can Edison estimate its cost savings and thus the rate reduction effect

[6] The object of the Sherman Act is to promote competition and improve resource allocation. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 255 F. 2d 214 (9th Cir. 1958) rev'd on other grounds, 359 U.S. 207; *In re*: *Multidistrict Vehicle Air Pollution*, 367 F. Supp. 1298 (D.C. Cal. 1973). That Edison's customers may be getting a good deal on bulbs proves nothing. In fact, it can be assumed that the availability of "cheap bulbs" results in the production and distribution of more light bulbs and electricity than would be the case if free competition in light bulb sales were allowed to occur. Indeed, there is evidence on the record that the object and effect of Edison's program results in just that kind of resource misallocation (26a, 29a, 163a, 292a).

when it hasn't bothered to compute the cost of service centers and agencies that should be, but has not been, allocated to the program.[7] (102a, 103a, 104a). Edison without factual basis in the record assumes a 50% markup by Plaintiff and other retailers despite clear evidence that such is not the case (see Appendix 69a, 70a where Plaintiff says he tries to get 30% to 35% markup). Regardless, it is not possible to determine what the free flow of the market place will do to bulb quantities sold, quality available and prices if Edison's program is stopped.[8]

Edison was apparently not satisfied to engage in this misleading flight of economic fancy and invention. Edison made an injudicious attempt to subvert the record by (1) alleging as fact the presumed statement of a witness which the court below was willing to listen to over Petitioner's objection, but which Edison chose not to offer at the hearing (appendix 173a, 174a, 189a), (2) claiming that no customers have complained of the program when their own answer to Petitioner's interrogatories disclose the pendency of a consumer class action in the state courts in Detroit attacking the program (39a), (see p. 1a of appendix hereto) and (3) set forth in the appendix to its Brief an undated, unsigned, unsworn, uncertified excerpt

[7] Edison's own survey prepared in 1970 shows the principal use of service centers is for the light bulb "exchange" (R.B. 29, 3a). Presumably, the cost associated with these centers and agencies could be substantially reduced and with it the cost of electricity if the program ceased.

[8] Also, Respondent persists in its Brief that it makes no profit on its light bulbs yet it admits that a portion of its working capital needs (including presumably the cost of light bulbs) is made a part of its rate base (97a, 102a) upon which it earned "a rate of return". Additionally, investment in service centers used to distribute light bulbs also is presumably a part of rate base.

from a transcript which had previously not been made available to Petitioner in this case despite Petitioner's repeated requests during depositions for any evidence of proceedings including testimony before the MPSC or any other regulatory agency regarding light bulbs.[9]

Respondent's cases, by way of contrast, highlight the absence of regulatory activity and concern in this case.

In *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), the S.E.C. was given specific statutory authority over commission rates. The MPSC has no such authority with respect to light bulbs. In *Gordon* the Supreme Court took notice of the ample evidence of formal and informal studies and consideration given by Congress and the S.E.C. to fixed commission rate arrangements. There was no such consideration in the instant case.

In *Jeffrey* v. *Southwestern Bell,* 518 F. 2d 1129 (5th Circuit 1975), Plaintiff consumers were not permitted to attack a rate under the guise of a federal antitrust claim, in part, because these same consumers, represented by counsel had fought the rate before the rate making body. Demonstrated regulatory consideration—of the kind that is so obviously missing in the instant case—support the result also in *Gas Light Co. of Columbus* v. *Georgia Power Company,* 440 F. 2d 1135 (5th Circuit 1971), cert. denied 404 U.S. 1062 (1972). In *Georgia Power* the Court said in protecting certain anticompetitive practices which were included in the defendant's tariff:

[9] Petitioner is frankly outraged by this eleventh hour attempt to cloud the issues. However, the transcript of testimony (R.B. Appendix 1b), if it does anything, demonstrates the blatant openness with which Edison at will modified the program without either supervision or approval let alone command of the MPSC.

> "As we have seen above, the Commission here gave lengthy consideration to each of the practices and rates under attack, and later full adversary hearings ordered them into effect, some with major modifications." 440 F. 2d 1135, 1140

In *Business Aides, Inc.* v. *Chesapeake & Potomac Telephone Company of Virginia,* 480 F. 2d 754, 756 (4th Circuit 1973) an antitrust exemption was allowed upon evievidence that the plaintiffs were represented by counsel and participated in public hearings of the regulatory commission at which the practices under attack were approved. 480 F. 2d 754, 756-7.[10]

[10] In *Business Aides,* reference to the adversarial hearings before the commission is admittedly *dicta.* The exemption was allowed not because the regulatory agency considered the practice attacked, but because the defendants ". . . actions were occasioned by adherence to the rules and regulations of its operative tariff. . ." 480 F. 2d 754, 756. It is this holding which the District court in the instant case adopted as controlling and from which the Petitioner has appealed. Another Court of Appeals opinion coming from the same circuit as *Business Aides* and which deals with the shielding of anticompetitive practices with a state action exemption is *Washington Gas Light Co.* v. *Virginia Electric and Power Co.,* 438 F. 2d 248 (4th Circuit 1971), the so-called "VEPCO" decision. VEPCO extended antitrust exemption to an anticompetitive practice merely because the state had authority, although unexercised, to stop the practice. The VEPCO decision has been much criticized. See, *Norman's On the Waterfront, Inc.* v. *Wheatly,* 444 F. 2d 1011, 1018 (3rd Circuit 1971). Note, *Parker* v. *Brown Gone to Hecht: A New Test For State Action Exemptions,* 24 Hastings Law Journal, 287, 306 (1973), *Recent Cases, State Action Exemption,* 85 Harvard Law Review, 670 (1972), and now, given this Court's decision in *Goldfarb* v. *Virginia State Bar Association,* 95 S.Ct. 2004 (1975, would appear no longer to have any force.

III. RESORT TO THE MPSC SERVES NO USEFUL PURPOSE.

Respondent has suggested, at great length, that the proper forum for determining the question before this Court is the Michigan Public Service Commission. The issue before this Court is whether or not the activities of the Michigan Public Service Commission with respect to Detroit Edison's lamp distribution program constitutes state action within the meaning of *Parker* v. *Brown*. Petitioner submits this is an issue for judicial and not regulatory determination. Furthermore, it seems peculiar that at this late stage Respondent, after being twice successful in the federal courts on the issue which it raised, should seek to avoid the antitrust court's determination of the matter.

Regardless, certain fundamental conditions of law and fact in this case preclude a resort to the MPSC.

1. As Petitioner has repeatedly argued, the MPSC lacks statutory authority to authorize continuance or discontinuance of the light bulb program. The limited authority of the MPSC has been clearly decided by the Michigan Supreme Court. *Huron Portland Cement Co.* v. *Public Service Commission,* 351 Mich. 255, 88 N.W. 2d 492 (1958); see also *Detroit Edison* v. *City of Wixom,* 10 Mich. App. 218, 159 N.W. 2d 230 (1968), rev'd on other grounds 382 Mich. 673. No purpose is served therefore in sending the matter back to the MPSC for a determination of its authority except perhaps to frustrate Petitioner's antitrust rights.

2. A pure and simple antitrust action has been brought by the Plaintiff, a competitor of Detroit Edison, not a consumer of its services. Sending the Petitioner back to the MPSC precludes Petitioner from having his antitrust claim adjudicated and obtaining appropriate relief.

A. The MPSC's predecessor agency has disclaimed jurisdiction to make an antitrust inquiry. *McCrea* v. *Detroit Gas Co.,* 24 P.U.R. (N.S.) 225, 227 (Michigan Public Utilities Commission, 1938). In 1937 the Wayne County, Michigan Prosecuting Attorney petitioned the Michigan Public Utilities Commission to investigate schemes pursuant to which existing gas rates had been established, as well as the effect of the monopolistic gas interests upon the price of natural gas to Michigan customers. The Public Utilities Commission did have authority over gas rates which was comparable to its authority over electric rates (see MCLA 460.54) and the rates which were the subject of the Petition presumably had previously been approved by the Commission. Nonetheless, the Commission stated:

> "That it is without jurisdiction to investigate the acts, practices, devices, and schemes under which the present rates were established, in order to consider and report how such evils may be remedied, and to investigate, report, and act in respect to the control and domination of monopolistic gas interests over the markets in the State of Michigan, and the effect thereof in enhancing the price of natural gas to Michigan customers." *McCrea* v. *Detroit Gas Co., supra.*

The basic regulatory authority of the MPSC is the same as its predecessor, the Michigan Public Utilities Commission, no more, no less. MCLA 460.4; *Huron Portland Cement Co.* v. *Public Service Commission,* 351 Mich. 255, 264; 88 N.W. 2d 492, 497 (1958). Therefore, if this case were returned to the Commission, the Commission following its own precedent would put the Petitioner back in the federal court.

B. The MPSC can only act prospectively. It cannot give damages for a business tort. Whatever relief it is that

the Respondent envisions Petitioner obtaining from the Commission it is at least clear that the MPSC only acts prospectively and cannot provide Petitioner with the monetary relief obtainable in an antitrust action in the federal court. *Muskegon Agency, Inc.* v. *General Telephone Company of Michigan,* 340 Mich. 472, 482 (1954), 65 N.W. 2d 748, 753, *Valentine* v. *Michigan Bell Telephone Company,* 388 Mich. 19, 30 (1972), 199 N.W. 2d 182; *Michigan Bell Telephone Company* v. *Michigan Public Service Commission,* 315 Mich. 533, 546, 547, 24 N.W. 2d 200, 205, 206 (1946).

C. Resort to the MPSC denies Petitioner of a proper forum.

The MPSC lacks the legal expertise necessary to adjudicate claims of violation of the federal antitrust laws (see 2A above). The MPSC cannot provide the Petitioner with a jury trial; nor are traditional means of discovery available. Furthermore, even if Petitioner was successful in obtaining whatever relief Edison asserts Petitioner may be entitled to, Edison could simply appeal that decision and the case ultimately would require a judicial determination (see discussion *infra* p. 14, of Mr. Justice Marshall's concerns for judicial economy). It is well known that the federal antitrust courts are the repository of expertise when it comes to antitrust claims.

3. In the sense that the term is used in MCLA 460.551 etc., Petitioner's action attacks neither the "rate" nor the reasonableness of the rate approved by the Michigan Public Service Commission nor the conditions of service under which electricity is tranmitted or distributed (MCLA 460.551). The decision of the Supreme Court of Michigan in *Valentine* v. *Michigan Bell Telephone Company,* 388 Mich. 19, 199 N.W. 2d 182 (1972), demonstrates that causes of action sounding in tort for damages against

utilities, while they may touch upon rates, are nevertheless maintainable in courts of general jurisdiction. It is clear that the mere fact that a rate or rate schedule may be tangentially involved in litigation is not sufficient to oust a court of competent jurisdiction from hearing the claim recognizable in law which could grant Plaintiff the relief sought.

4. Respondent places principal reliance upon *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973) for the proposition that this case should be dismissed and Petitioner seek relief before the MPSC. Respondent's reliance on *Ricci* is misplaced. In *Ricci* a trader on the Chicago Mercantile Exchange filed an antitrust action claiming that his seat was transferred contrary to a membership rule adopted by the Exchange. The rule had been approved by the Commodity Exchange Commission pursuant to the Commodities Exchange Act. Justice White, writing for a 5 to 4 majority directed the district court to retain jurisdiction for purposes of determining the antitrust question, but only after the Commission had considered plaintiffs' claims that the Exchange rule was improper or had not been followed. Justice White, recognizing the force of the dissents made clear that the decision was a limited one. Exchange membership requirements, Exchange operations and Exchange adjudication procedures were in issue. It was to obtain the Commission's expertise in resolving those questions that this case was sent to the Commission. Justice White said:

> "We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership

> rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and exchange rules." 409 U.S. at p. 307.

No one here has questioned whether Edison is complying with its rate schedules, nor is there any material question of fact here relating to what the MPSC did or did not do. (We must assume that by this time the Respondent has produced its best evidence of MPSC activity). Nor does it seem that the MPSC can shed any additional light on its own authority given the extent to which its authority has already been examined by the courts.

The conduct of the Respondent which Petitioner claims is anticompetitive is well known and admitted. The legal effect of that conduct can be assessed by well established judicial precedents.

These distinctions make the dissenters' comments in *Ricci* especially compelling here against Respondent's claim that the MPSC may shed some light on the issues in this case (R.B. 55). Mr. Juctice Marshall said in response to just such a claim:

> "I had not thought that petitioner need meet the burden of showing that resort to administrative remedies would be totally useless before securing adjudication from a court. Indeed, in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity. But we have never suggested that such suits must therefore invariably be postponed while the agency is consulted. . . . On the contrary, in these days of crowded dockets and long court delays, the doctrine frequently prolongs and complicates litigation. More fundamentally, invocation

> of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right. . . This principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given courts, rather than agencies, the primary duty to act. Cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 487-490 (1962)." 409 U.S. at p. 320.

Ricci is further distinguishable in that at least there the rule of the Exchange was to be reviewed by an independent body. Respondent here is asking the MPSC to consider in quasi-judicial capacity a practice which it allowed in its quasi-legislative capacity. This cannot and should not be the law. Cf. *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 389 (1932).

5. Respondent is not here asking the Court to invoke the doctrine of primary jurisdiction. Primary jurisdiction allows a court while retaining jurisdiction of the main action, to require the parties to obtain a determination of some subsidiary question which lays within expert province of an administrative agency. *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Macom Products Corp.* v. *American Telephone & Telegraph Co.*, 359 F. Supp. 973 (C.D. Cal. 1973); Davis, *Administrative Law Text*, 1959, p. 344 *et seq.* Respondent wants the case dismissed (R.B. 54). Respondent is not seeking to invoke the doctrine of exhaustion here—though they occasionally use that term (R.B. 60). The doctrine of exhaustion can be used when the matter in issue is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. *Davis, supra*, p. 356. As indicated, the MPSC is not able to provide Petitioner with the relief afforded by the antitrust laws.

So, what is it Respondent is asking this Court to do? First, it appears Respondent is asking the Court to extend the doctrine of *Parker* v. *Brown* to every activity of a public utility taken under color of an approved tariff or rate schedule without regard to the authority of the supervising agency or the degree of regulatory consideration given to the practice. Petitioner has amply demonstrated this should not be the law.

Alternatively, it appears the Respondent, wholly apart from the Court's determination of the *Parker* v. *Brown* issue, is asking for a new rule of law applicable only to public utilities sued for antitrust violations, i.e., that when the activity attacked is engaged in under color of an approved tariff or rate schedule resort should first be had to the "approving" regulatory agency before coming into federal court, regardless of the authority of the agency, its procedures, the posture which the claimant must assume, the lack of adequate relief and the existing expertise of the federal courts. Applying such a rule and assuming the claimant obtained a favorable prospective result, he would still have to go to federal court to prove his liability under antitrust standards and to prove his damages. Lack of success in such a procedure would likewise not prevent him from coming to court. In short, Respondent's suggestions accomplish nothing except to frustrate and delay the Petitioner and the judicial process.

CONCLUSION

Respondent has not provided the Court with the basis for affirming the decisions below.

Respectfully submitted,

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APPENDIX

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARLES GILL, RONALD PIGEON, THERESA QUICKSEY, and JUDITH SPIVEY,

Plaintiffs,

vs.

THE DETROIT EDISON COMPANY,
a Michigan corporation,

Defendant.

Civil Action No. 73-230257

CLASS ACTION
COMPLAINT FOR A DECLARATION OF RIGHTS AND OTHER APPROPRIATE RELIEF

COUNT I

Charles Gill, Ronald Pigeon, Theresa Quicksey, and Judith Spivey (hereinafter referred to as Plaintiffs), individually and in a representative capacity on behalf of all other family-situated Domestic Service Rate customers of Detroit Edison Company (hereinafter referred to as Detroit Edison) by their attorneys, Lopatin, Miller, Bindes & Freedman, complain of Detroit Edison as follows:

1. At the present time, and for many years previously, defendant, Detroit Edison, has done business in Michigan and has had its principal place of business in Detroit, Michigan.

2. Now, and at all pertinent times, defendant Detroit Edison has been engaged in selling electrical energy to Michigan Domestic Service Rate customers.

3. Now, and at all pertinent times, plaintiffs have been Domestic Service Rate customers of Detroit Edison.

4. During this period, plaintiffs have not known of or utilized defendant Detroit Edison's Lamp Supply Service or Appliance Repair Service.

5. Plaintiffs are informed, and on such information and belief allege the fact to be, that plaintiffs and other Detroit Edison Domestic Service Rate customers have been secretly charged for Lamp Supply Service and Appliance Repair Service through monthly charges imposed by defendant Detroit Edison, regardless of plaintiffs' and other Domestic Service Rate customers' lack of use of these services and notwithstanding defendant Detroit Edison's failure to inform plaintiff and other Domestic Service Rate customers that charges would be imposed whether or not the services were utilized.

6. Not only has defendant Detroit Edison failed to inform its Domestic Service Rate customers of the secret charges imposed for Lamp Supply Service and Appliance Repair Service, but defendant Detroit Edison wrongfully has advertised these services to be "extra" and "no charge". See plaintiffs' Exhibit A annexed hereto.

7. Plaintiffs are informed, and on such information and belief allege the fact to be, that defendant Detroit Edison's failure to inform plaintiffs and other Domestic Service Rate customers of the imposition of monthly charges for Lamp Supply and Appliance Repair Service regardless of lack of utilization of these services, as well as defendant Detroit Edison's wrongful misrepresentations that Lamp Supply Service and Appliance Repair Service are "extra" and "no charge" have not been authorized or approved by the Michigan Public Service Commission.

8. Defendant Detroit Edison's failure to inform plaintiffs and other Domestic Service Rate customers of the imposition of monthly charges for Lamp Supply Service and Appliance Repair Service regardless of lack of

utilization of these services and defendant Detroit Edison's wrongful misrepresentations that Lamp Supply Service and Appliance Repair Service are "extra" and "no charge" constitute conduct inconsistent with a public utility's obligation to advise its customers of material facts pertaining to the public utility's mode of operation.

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service, an Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and who have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before this Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiff may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court impress a constructive trust on all collections of charges for Lamp Supply Service and Appliance Repair Service from plaintiffs and other Domestic Service Rate customers similarly situated who have not been informed that these charges would be collected regardless of their degree of utilization of these services; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT II

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count 1, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count II, as if fully set forth.

8. Plaintiffs and other Domestic Service Rate customers neither expressly nor impliedly have assented to defendant Detroit Edison's secret imposition of charges for Lamp Supply Service and Appliance Repair Service, which services they have not utilized to an extent which

is commensurate with the monthly charges collected for these services, and where services have been advertised as "extra" and involving "no charge."

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore, plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply

Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has been unjustly enriched by the secret collection of charges for Lamp Supply Service and Appliance Repair Service from plaintiffs and all other Domestic Service Rate customers who never have been informed that these charges would be imposed regardless of their utilization of these services and award damages for this unjust enrichment; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT III

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count III as if fully set forth.

8. Plaintiffs and all other Domestic Service Rate customers have had their property subjected to defendant Detroit Edison's dominion and control without their consent by virtue of defendant's secret imposition of charges for Lamp Supply Service and Appliance Repair Service, which services plaintiffs and other Domestic Service Rate

customers have not used to an extent which is commensurate with the monthly charges collected for these services and which services have been advertised as "extra" and involving "no charge."

9. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the Courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as extra and involving "no charge";

6. that the Court declare that defendant Detroit Edison has unlawfully converted the property of plaintiffs and all other Domestic Service Rate customers through the secret collection and misappropriation of charges for Lamp Supply Service and Appliance Repair Service which the plaintiffs and other Domestic Service Rate customers have not used and award damages for this conversion; and

7. that plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT IV

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6, and 7 of Count IV, as if fully set forth.

8. At all pertinent times there was, and is, in full force and effect, a statute of the State of Michigan, designated as Mich. Comp. Laws § 750.33. This statute provides as follows:

> Any person, who with intent to sell, purchase or in anywise dispose of or acquire merchandise, securities, service or anything offered or sought by such person, directly or indirectly, or to from the public for sale, purchase or distribution, or with intent to create the consumption thereof, or to induce the public in any manner to enter into any obligation thereto or any interest therein, makes, publishes, disseminates, circulates, or places before the public, or causes directly or indirectly to be made, published, disseminated, circulated, or placed before or communicated to the public in this state . . . in advertisement of any sort of regarding merchandise, securities, service or anything so offered to or sought from the public, or regarding the motive or purposes of a sale, purchase, distribution or acquisition which advertisement contains any assertion, representation, or statement or illustration, including statements of present or former sale price or value, which is untrue, deceptive, or misleading, or calculated to subject any person to disadvantage or injury through the publication of false or deceptive statements . . . shall be guilty of a misdemeanor. . . .

9. The course of conduct alleged in Paragraphs 1, 2, 3, 4, 5, 6, and 7 includes untrue, deceptive, and misleading assertions, representations, and statements concerning present price made with intent to sell electrical energy and calculated to subject to injury plaintiffs and all other Domestic Service Rate customers who have not utilized Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services in that:

A. Plaintiffs and other Domestic Rate Service customers have been charged secretly for the benefits of Lamp Supply Service and Appliance Repair Service on a monthly basis;

B. Yet, plaintiffs and other Domestic Rate Service customers never have been informed that these

charges would be imposed regardless of their lack of utilization of these services.

10. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardship to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the Plaintiffs fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that this Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply

Services and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has violated Mich. Comp. Laws § 750.33 and award damages to plaintiffs and other Domestic Service Rate customers; and

7. that Plaintiffs be awarded reasonable attorney's fees and costs, and any other relief that the Court may deem just and equitable.

COUNT V

1. Plaintiffs reallege and incorporate Paragraphs 1 through 7 of Count I, as Paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count V, as if fully set forth.

8. Since March 10, 1967, there have been, and are, in full force and effect, certain statutes of the State of Michigan designated as Mich. Comp. Laws §§ 445.801-.809. These statutes provide as follows:

> Section 445.801.
>
> It shall be unlawful for any person knowingly to make, publish, disseminate, circulate or place before the public any advertisement which contains any statement or representation which is untrue, deceptive, or misleading. . . .

Section 445.803.

In determining whether or not advertising is deceptive or misleading, there shall be taken into account, in addition to the above, the extent to which the adveristising fails to reveal facts material in the light of representations made or suggested in a positive manner.

9. The course of conduct alleged in Paragraphs 1, 2, 3, 5, 6 and 7 has been knowingly engaged in by defendant Detroit Edison and involves statements, representations, and nondisclosures which are untrue, deceptive, and misleading in that:

A. Plaintiffs and other Domestic Service Rate customers are charged secretly for the benefits of Lamp Supply Service and Appliance Repair Service on a monthly basis;

B. Yet, plaintiffs and other Domestic Service Rate customers never have been informed that these charges would be imposed regardless of their utilization of these services and defendant Detroit Edison has advertised these services as "extra" and "no charge."

10. Plaintiffs and other Domestic Service Rate customers have been and are being damaged by the secret charges for Lamp Supply Service and Appliance Repair Service imposed by defendant Detroit Edison. Yet, plaintiffs and other Domestic Service Rate customers similarly situated have no adequate remedy at law and can obtain complete relief only in equity. Further, plaintiffs and other Domestic Service Rate customers similarly situated have been and will continue to be irreparably harmed and forced to litigate their claims individually and through a multiplicity of suits which will cause great hardships to plaintiffs and other Domestic Service Rate customers similarly situated, to the courts, and to the defendant Detroit Edison, unless this Court grants appropriate relief.

Wherefore plaintiffs pray:

1. that the Court declare that the Domestic Service Rate customers of defendant Detroit Edison who do not utilize Lamp Supply Service or Appliance Repair Service to an extent which is commensurate with the monthly charges collected for these services, and have not been informed that monthly charges are imposed for Lamp Supply Service and Appliance Repair Service regardless of their lack of utilization of these services, constitute a class too numerous to be practicable to bring before the Court, that the plaintiff fairly and adequately represent this class, and that the plaintiffs may prosecute the joint and common claims of this class;

2. that the Court enjoin and prohibit the institution of any and all duplicative class actions on behalf of Domestic Service Rate customers of defendant Detroit Edison until this action has been finally disposed of;

3. that the Court declare that defendant Detroit Edison may not impose secret charges for Lamp Supply Service and Appliance Repair Service on its Domestic Service Rate customers and may not misrepresent its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

4. that the Court order defendant Detroit Edison to inform its Domestic Service Rate customers of the fact of and of the amount of the charges for Lamp Supply Service and Appliance Repair Service that are included in their monthly bills whether or not they utilize these services;

5. that the Court enjoin defendant Detroit Edison from further advertising its Lamp Supply Service and Appliance Repair Service as "extra" and involving "no charge";

6. that the Court declare that defendant Detroit Edison has violated Mich. Comp. Laws §§ 445.801, 445.803 and award damages to plaintiffs and other Domestic Service Rate customers; and

7. that Plaintiffs be awarded reasonable attorney's fee and costs, and any other relief that the Court may deem just and equitable.

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